No. 87-705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNION PACIFIC RAILROAD CO., *et al.*,
Petitioners,

v.

ENERGY TRANSPORTATION SYSTEMS, INC., *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS ENERGY TRANSPORTATION SYSTEMS, INC. AND ETSI PIPELINE PROJECT, A JOINT VENTURE, IN OPPOSITION

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November 30, 1987

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QUESTIONS PRESENTED*

1. Whether, under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), an antitrust defendant necessarily enjoys *Noerr-Pennington* protection where one of twenty-one claims it sued upon to challenge a governmental license to a competitor was successful, even though it lacked standing to bring the successful claim, the unsuccessful claims themselves caused delays that impaired competition, a number of the claims had been intentionally obscured at the administrative level in the hope that relief would be denied there, occasioning further delay through judicial review, and the suit was one of more than a hundred baseless judicial and administrative challenges.

2. Whether, under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), antitrust defendants necessarily enjoy *Noerr-Pennington* protection for the baseless, unsuccessful, and intentionally delaying defense of sixty-nine lawsuits which their illegal boycott forced the antitrust plaintiff to bring and which were part of a campaign of more than a hundred baseless judicial and administrative challenges.

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* The third and fourth questions presented by petitioners are not involved in this proceeding, as we demonstrate *infra*.

THE PARTIES BELOW

A list of the Respondents-Plaintiffs below is contained in the Petition.

Pursuant to Rule 28.1, a statement reflecting respondents' corporate parents, subsidiaries (other than wholly owned subsidiaries) and affiliates has been lodged with the Court.

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Respondents Energy Transportation Systems, Inc. and ETSI Pipeline Project, a Joint-Venture (ETSI), respectfully submit this Brief in Opposition to the Petition of the Union Pacific (UP) and other railroad companies to review the order of the United States Court of Appeals for the Fifth Circuit issued July 14, 1987 and reported at 822 F.2d 518. *See* Pet., App. A.

COUNTER-STATEMENT OF THE CASE

This case arises out of a discovery dispute between the parties in a pending antitrust case. The ETSI respondents (plaintiffs below) contend that the petitioner railroads (defendants below), afraid of losing coal transportation business to the proposed ETSI pipeline, conspired

to prevent the pipeline's construction. ETSI was joined as plaintiff below by two electric utilities that would have been served by the pipeline.[1]

1. ***The Decisions Below.***

ETSI's complaint alleges that in order to delay or destroy ETSI as a competitor, the railroad petitioners mounted a campaign involving more than a hundred separate challenges to governmental and private approvals needed by ETSI. The purpose of these challenges, all but one of which was unsuccessful, was not a genuine desire to obtain the judicial relief sought, but rather to use the judicial and administrative processes to disrupt, delay, and ultimately destroy the ETSI project.[2]

Because the railroads' sham campaign was conceived and carried out by lawyers, most of the documents chronicling its implementation and effect have been withheld as privileged. ETSI moved to compel production of these privileged documents, alleging that they were prepared in furtherance of a crime or fraud—namely a vio-

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[1] ETSI has settled with UP and Chicago and North Western, but the settlements expressly exclude the discovery issues here involved. One of the two utility plaintiffs, Arkansas Power & Light Co., has settled with all the railroad defendants.

[2] The railroads fully understood that delay was their ally in opposing ETSI. Delay caused uncertainty and doubt in the minds of ETSI's potential customers, while allowing the railroads to continue earning monopoly profits from coal transportation. Because the project was pursued during highly inflationary times, delay also increased capital and construction costs for the pipeline, thus pushing its rates up. As the start-up date for the pipeline was delayed past the time when potential customers' coal burning plants came on stream, those customers were forced to begin taking coal by rail, thus incurring substantial rail-related capital costs (for cars and unloading facilities) and exposing themselves to rail rate increases for the interim period before pipeline transportation could be commenced.

lation of the federal antitrust laws. The district court reviewed a voluminous record and concluded that ETSI had offered sufficient evidence of illegal activities to invoke the exception and overcome the *Noerr* protection. Pet., App. B.

On the railroads' petition for mandamus, the Fifth Circuit disagreed with parts of the district court's reasoning and directed it to vacate its order of production and reconsider the matter. Pet., App. A. The court of appeals did not hold that any petitioning conduct was sham or that it will give rise to treble damage liability. It merely eschewed the categorical rules pressed on it by the petitioners and authorized the district court to examine the facts to determine whether ETSI had made a *prima facie* showing that some or all of the defendants' petitioning activities constituted a sham. It is this opinion that is challenged by the railroads' petition for *certiorari*.[3]

That petition wholly ignores the basic issue in dispute—whether the railroads must produce a multitude of documents which are highly relevant to the sham issues. The petition also largely ignores the underlying facts, which highlight the errors of the categorical legal propositions it asks this Court to adopt. Accordingly, a more complete statement of the factual context is required.[4]

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[3] On remand, applying the guidelines laid down by the court of appeals, and examining thousands of pages of exhibits, deposition testimony and briefs, the district court found "clear and convincing" evidence with respect to each of the railroads' petitioning activities that they lacked a genuine desire for judicial relief as a significant motivating factor and were intended to harm a competitor through the mere invocation and maintenance of the judicial process. The court again ordered production of the allegedly privileged materials. Pet., App. F. For a second time the railroads sought mandamus review in the Fifth Circuit, which was denied on November 3, 1987. No. 87-6115 (5th Cir.). That decision is not before this Court.

[4] The conduct summarized in the following pages is fully established by the documents and deposition testimony of record. However, the Court need not assume that these are the facts. It is only

2. The ETSI Project and Its Historical Setting.

The ETSI coal slurry pipeline project was conceived in 1973 to move inexpensive low-sulphur coal from the Powder River Basin of Wyoming to fuel utility boilers in Arkansas. The efficiency of pipeline transportation, and its relative immunity to inflationary cost increases (because a large proportion of its costs are fixed), prompted estimates that during its twenty-year life ETSI would save consumers $14 billion over the cost of transporting coal by rail.[5]

Prospective competition from ETSI would break the stranglehold then (and still) held by the railroads over coal mined in the Powder River Basin. In 1973, virtually all such coal was moved out of the Basin in Burlington Northern (BN) unit trains which were ultimately passed to such destination carriers as Kansas City Southern (KCS), Missouri Pacific (MoPac), and Santa Fe. Other defendant railroads such as Chicago and North Western (CNW), and later UP, planned to establish rail service into the Basin. The enormous coal supplies in the Basin, their low mining cost and sulphur content, and the burgeoning demand for such coal by utilities in the south central portion of the United States combined to promise—and ultimately deliver—billions of dollars in railroad profits from hauling Powder River Basin coal. The railroads thus had an obvious incentive to block ETSI's entry.

3. The Express Crossing Boycott.

In order to build its pipeline from Wyoming to Arkansas, ETSI had to cross under dozens of railroad tracks. Permission for most pipelines to cross under an

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necessary for the Court to see that the categorical rules demanded by petitioners would incorrectly immunize such conduct from antitrust liability, whether in this case or in some subsequent case.

[5] Memorandum in Support of Plaintiffs' Second Motion to Compel Production of Documents (Crime-Fraud) (filed August 8, 1985) (hereafter "ETSI Crime-Fraud Mem."), Att. 1 & 2.

existing railroad track is granted routinely, quickly and cheaply, and is evidenced by a standardized document known as a "crossing permit." By early 1974 there were hundreds of oil, gas, and water pipelines crisscrossing the western United States, involving tens of thousands of crossing permits.

ETSI's initial approaches, to the BN and MoPac, produced the response usually accorded crossing pipelines: BN promised to grant crossings and even offered to assist ETSI in securing crossings from other railroads; MoPac granted the desired crossings.

However, ETSI's March 19, 1974 visit with the Frisco (later merged into BN) produced a different response. Frisco's President candidly told the ETSI representatives that he would need to consult with presidents of other railroads and arrive at an industry position before deciding whether or not to grant ETSI's crossings. ETSI Crime-Fraud Mem., Att. 21. Thereafter, by telephone and at a trade association meeting, the Frisco President had conversations with the presidents of BN, Santa Fe, UP, CNW, KCS and MoPac, as well as the now-bankrupt Rock Island. *Id.* Att. 25-27, 29.

Out of those conversations and numerous others grew a railroad boycott to deny crossings to ETSI. Pet., App. B at 49a. BN reversed its position and at a meeting in May 1974, entered into an explicit agreement with CNW, memorialized by memoranda on each side, that each road would oppose crossings for ETSI and inform each other if either road changed its position in that regard. *E.g.*, ETSI Crime-Fraud Mem., Att. 30. In early August 1974, the BN Chairman and UP's President affirmed their parallel agreement by exchanging blind carbon copies of their separate letters denying crossings to ETSI.[6] The

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[6] ETSI Plaintiffs' Second Supplemental Memorandum in Support of its Second Motion to Compel Production of Documents (Crime-Fraud) (filed July 9, 1986) (hereafter "ETSI Second Supp."), Att. 287, 288.

CNW President sent a blind copy of his letter denying ETSI crossing rights to BN's President, evidencing CNW's implementation of the May agreement. ETSI Crime-Fraud Mem., Att. 34. In early August, officials of both KCS and Santa Fe conferred with each other and with other railroads before deciding how to respond to ETSI's crossing requests.[7]

During the remainder of 1974, all of 1975, and well into 1976, the railroad boycott was maintained intact through frequent contacts by marketing representatives and attorneys. For example, in early 1975 UP's general attorney in Kansas reminded attorneys for the Santa Fe, MoPac,[8] Rock Island, Frisco, and M-K-T:

> "It might not be a bad idea for all the general attorneys to check their own particular companies to find out if inadvertently one portion of the companies might be working out a license by which the pipeline would cross the right-of-way of the various railroads." ETSI Crime-Fraud Mem., Att. 39.

4. *The Window Litigation.*

By mid-1976 ETSI determined that there were gaps or "windows" in the railroad rights-of-way at which the railroads did not own their rights-of-way in fee but held instead only an easement interest. To break the railroad boycott, ETSI therefore purchased crossing rights at such locations from the abutting fee owners. Still, the railroads would not grant crossing permits, even at the easement locations, and (as Covington & Burling recognized in a December 1981 opinion for their railroad clients) "forced [ETSI] to litigate in an effort to obtain rights-

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[7] Reply Memorandum in Support of Plaintiffs' Second Motion to Compel Production of Documents (Crime-Fraud) (filed November 18, 1985) (hereafter "ETSI Reply Mem."), Att. 220; *see also* ETSI Crime-Fraud Mem., Att. 32, 33.

[8] MoPac, which had initially granted crossings, refused to renew those permits in 1976.

of-way over railroad land." ETSI Crime-Fraud Mem., Att. 61; *accord* Pet. App. B at 37a, 48a.

A few days after the initial ETSI window suits were filed, lawyers for the railroads met to plan "strategy and tactics" for joint defense of those cases. ETSI Crime-Fraud Mem., Att. 49. They "agreed" that, although their defenses in most of the cases were "untenable,"[9] "it would be to our advantage to pursue discovery procedures, with the hope of developing facts that might be helpful in other arenas, such as the legislative eminent domain fight." ETSI Reply Mem., Att. 201.

The railroads' own attorneys at Covington & Burling reported in December 1981 that "the railroads have been entirely unsuccessful in numerous [window] lawsuits brought by ETSI," and observed that "ETSI's long series of victories" would support a characterization that "the railroads' unsuccessful defenses of their lawsuits were . . . baseless." ETSI Crime-Fraud Mem., Att. 61.

In all, sixty-nine window suits were filed and won by ETSI during a five and one-half year period from July 1976 through December 31, 1981. Although the suits involving MoPac were routinely disposed of on the basis of agreed judgments, even those suits would have been unnecessary but for pressure from other railroads which led MoPac to feel, according to its Vice President-Law, an obligation to require ETSI to file lawsuits. Chambers Dep. Exh. 36. Many of the window suits were intentionally strung out by the railroads for the express purpose of delaying the ETSI project. For example, KCS, knowing its position was baseless, defended its Oklahoma

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[9] Indeed, in Kansas, a longstanding decision of the Kansas Supreme Court specifically held that railroads could not own right-of-way in fee, making it absolutely clear that the railroads could have no possible meritorious defense to ETSI's window suits there. Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905); *see also* Harvest Queen Mill & Elevator Co. v. Sanders, 189 Kan. 536, 370 P.2d 419 (1962).

cases all the way to the Supreme Court of that state, postponing the "inevitable quieting of title in [ETSI]," ETSI Crime-Fraud Mem., Att. 46, for four and one-half years. A KCS document, now withheld as privileged but produced in response to court order in another case, explains that KCS's policy in defending ETSI's window lawsuits was to "delay every way we can." [10]

5. *ETSI's Governmental Permits and the Andrews Litigation.*

On April 10, 1979, with the right-of-way boycott crumbling in the face of ETSI's window litigation,[11] the railroad petitioners met in Chicago to map a new strategy against ETSI and elected KCS to "spearhead" the new phase of the campaign. ETSI Crime-Fraud Mem., Att. 6. The railroads knew ETSI's proposed pipeline could not be built without first obtaining numerous governmental permits, including permits from the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS), to cross federal lands. Before BLM and USFS could grant the needed permits, the federal government was required by the National Environmental Policy Act (NEPA) to consider the impact of the proposed pipeline on the environment and to issue an environmental impact statement (EIS). The centerpiece of the railroads' new strategy was, therefore, intense and concerted opposition to the development and approval of the EIS. The object of the new strategy was explained by a railroad lawyer in June of 1979: to "mak[e] the environmental evaluation as difficult as possible" and "[h]opefully . . . bog

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[10] Memorandum Brief in Support of ETSI's Renewed Motion to Compel Production of Documents (Crime-Fraud) (filed August 13, 1987) (hereafter "ETSI Renewed Crime-Fraud"), Att. 5.

[11] Though ETSI had won enough window cases by mid-1979 to prove that the railroads' right-of-way boycott was not an insurmountable obstacle to the pipeline, the boycott continued to cause substantial delay until the project's termination in 1984.

down the study with numerous statistical studies . . . ." ETSI Reply Mem., Att. 202.

In July 1979, the BN retained an expert to mastermind the railroads' opposition to ETSI's proposals to use Wyoming water as a transport medium for its slurry mixture. In August 1979, a year before BLM issued even a draft EIS, the railroads' "Ad Hoc Committee" to implement its anti-ETSI strategy met again and agreed that the not-yet existent EIS "need[s] to be challenged." *Id.*, Att. 244. The litigation that embodied that challenge, filed three years later in August 1982, became known as the "*Andrews* case." [12]

During 1981 the new railroad campaign against ETSI was expanded and intensified. KCS hired the Washington law firm of Brown & Roady to oppose virtually all of ETSI's governmental permits, not merely those for which an EIS was required.[13] In a blitzkrieg of opposition over the next two years, the railroads entered appearances, sought hearings, and filed unsuccessful oppositions to more than thirty air and water quality, siting, and other governmental permits required by ETSI. These administrative challenges involved the assertion, indiscriminately and without regard to merit, of literally hundreds of claims. Not a single one of the claims the railroads brought in administrative forums was successful; these baseless claims were intended solely to obstruct and delay

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[12] *See* Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986), *cert. granted*, 107 S.Ct. 1346 (1987).

[13] Though Brown & Roady was nominally representing only KCS, that railroad was the "spear-carrier" and, in effect, elected representative of all the defendant railroads. As the district court specifically found on remand: "[*p*]*rima facie* evidence connecting each defendant with an effort to delay the administrative process justifies the invocation of the crime-fraud exception with respect to all of the railroad defendants." Pet., App. F at 93a.

the ETSI project.[14] In a conclusion that is not challenged by the railroads, the district court specifically found that these petitioning activities "in connection with administrative hearings regarding permits sought by ETSI were sham." Pet., App. F at 93a-94a. With the window suits, the administrative challenges brought to more than one hundred the number of separate proceedings in which the railroads had unsuccessfully opposed ETSI.

Some of the sham administrative oppositions were a predicate for the *Andrews* litigation. Thus, when the final ETSI EIS was issued by BLM in July of 1981, Brown & Roady prepared and filed a set of comments. In a letter transmitting those comments to several railroads, Brown & Roady explained their strategy of using the administrative process and the federal court to delay the ETSI project by deliberately contriving *to lose* claims before the BLM, thereby preserving a judicial remedy and enhancing the opportunity for delay:

> "We have attempted in this draft to develop a catalog of problems and issues not adequately covered in the Final EIS. We have attempted to make the list as extensive as possible, so as to protect KCS from any 'exhaustion of remedies' problems for failure to raise issues in the administrative process. *We have emphasized a listing and brief discussion of problems and have avoided detailed discussion. We are concerned that if KCS spells out its arguments in too much detail at this stage, they could be simply addressed in a Supplemental EIS, thus limiting the remedies that subsequently could be pursued.* The aim of the draft, therefore, is to suggest to the Interior Department that there are numerous problems not addressed in the Final EIS, *without revealing detailed supporting arguments. Our own files,*

[14] For example, an administrative proceeding in Oklahoma was referred to as "afford[ing] the railroad industry an opportunity to further delay pipeline construction." ETSI Renewed Crime-Fraud, Att. 6.

> *however, contain a more detailed and precise analysis of the deficiencies of the EIS to be used in any subsequent litigation.*" ETSI Crime-Fraud Mem., Att. 67 (emphasis added).

The "subsequent litigation" for which the draft comments on ETSI's EIS were a prelude was the *Andrews* litigation, filed in August 1982. Knowing the railroads lacked standing to assert many of the environmental and water claims they planned to assert, Brown & Roady solicited states, Indian organizations, and environmental, agricultural, and conservation groups to form a "coalition of parties" so that the suit would "have a maximum effect." ETSI Renewed Crime-Fraud, Att. 12. Eventually the firm assembled a group of environmental and farm groups, all of whom were assisted or represented by counsel paid for by the railroads. The railroads also persuaded three states—Missouri, Iowa, and Nebraska—to bring a similar suit against the federal government. Unbeknownst to the *Andrews* court, petitioner Union Pacific paid its Washington attorneys, Covington & Burling, to ghostwrite the briefs and pleadings for the state of Nebraska. When they learned of UP's role, Nebraska's co-plaintiffs, Iowa and Missouri, specifically disavowed and disapproved of Nebraska's conduct. *See* ETSI Reply Mem. at 98-99.

KCS's top executives recognized that the *Andrews* case "may achieve delay and nothing more." ETSI Renewed Crime-Fraud, Att. 10. The complaint was designed for that purpose, alleging twenty-one separate causes of action.[15] Only one—the highly technical allegation that

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[15] The complaint alleged injury resulting from violations of the Commerce Clause of the Constitution, the Flood Control Act of 1944, the Water Supply Act of 1958, the National Environmental Policy Act of 1969, the Reclamation Project Act of 1939, Section 10 of the Rivers and Harbors Act of 1899, the Fish and Wildlife Coordination Act, the Resource Conservation and Recovery Act, the Clean Water Act of 1977, and the Administrative Procedure Act.

the proper agency to approve ETSI's purchase of water from the Oahe Reservoir on the upper Missouri River in South Dakota was not the Bureau of Reclamation (BOR) but the Army Corps of Engineers (COE)—was accepted in the court's April 1984 ruling.[16] Most of the other twenty claims were baseless, and the railroads clearly lacked standing to bring many of them. *Id.*, Att. I-A & I-B. Among the baseless claims on which the railroads lacked standing were four counts (12-15) embodying the claims relating to the EIS, on which the railroad comments had hidden the ball from BLM. Much of the twenty months between filing and judgment was consumed in discovery and preliminary motions concerning the unsuccessful claims, especially those relating to the EIS.

The April 1984 summary judgment was granted only for the State plaintiffs. The court overruled the motion of the sole railroad plaintiff for a similar judgment, expressing doubts about KCS's standing to bring the claim questioning which federal agency had the authority to execute ETSI's Oahe water contract.[17] The trial court judgment was thereafter affirmed by the Eighth Circuit; *certiorari* was granted, and the case was argued before this Court on November 3, 1987. It is the success of the State plaintiffs on this one claim in a suit involving numerous fraudulent and baseless claims that, petitioners assert, immunizes all their conduct, no matter how egregious and unjustified, with respect to the *Andrews* litigation.

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[16] Since the railroads knew that COE favored the ETSI project and would have approved ETSI's water purchase, the purpose of asserting even that claim can only have been to delay the inevitable approval of ETSI's water purchase.

[17] ETSI Plaintiffs' Merits Brief in Opposition to Defendants' Motion for Partial Summary Judgment (filed July 9, 1986) (hereafter "ETSI Andrews Brief"), Att. 5.

REASONS FOR DENYING THE PETITION

The instant case presents no issue worthy of consideration by this Court upon *certiorari*. Not only are the categorical definitions of a non-immune sham demanded by petitioners unsound, but the procedural posture of the present case makes it an inappropriate vehicle for considering (and rejecting) them. Even if the Fifth Circuit's refusals to adopt general and abstract propositions that would govern this and future cases were wrong (which they were not), this Court's consideration should be deferred until it can be informed by a full record after trial, revealing more fully the parameters and context of the petitioners' misbehavior.

I. Summary of Reasons for Denying the Petition.

The railroads ask this Court to adopt a rule that "success" in litigation absolves everything they did in connection with the *Andrews* case. However, they ignore their *lack* of success on twenty of the twenty-one claims they mounted in that litigation. More fundamentally, they ignore the rationale for making "success" relevant at all. Success is relevant in the usual case—such as a monopolist patentee successfully showing that a new entrant has infringed his patent—because it shows that it was reasonable for the patentee to invoke governmental process, even though the infringer and competitive rivalry were thereby intentionally impaired. Obviously, however, the holding of the *Andrews* case does not mean that it was reasonable for petitioners (1) to suppose they had standing to sue at all, (2) to delay the proceedings with twenty baseless claims, or (3) intentionally to conduct the proceedings in such a way as to *avoid* obtaining at the administrative level the very relief they now say they genuinely sought from the *Andrews* court. Because of the court's refusal to find standing for KCS, the railroads cannot even say that *they* prevailed on any claim at all. And apart from the technical division of authority between the Engineers and the Bureau of

Reclamation, not one of the hundreds of claims made by petitioners was successful in their ten-year campaign to boycott, delay, and kill ETSI.

Petitioners also ask this Court to rule that defending lawsuits can never be a sham, even when (1) defendants forced ETSI to file those suits to secure crossings that the railroads routinely granted to others but denied to ETSI through an illegal boycott, (2) they then answered each of the suits, knowing their defenses were untenable, and sought discovery for use "in other arenas," all with the stated intention to "delay every way we can," and (3) they lost sixty-nine straight decisions.

Thirdly, petitioners seek a rule that one who foments and involves himself in a suit by a third party enjoys *Noerr* protection to the same extent as that third party even if the fomenter has no reasonable grounds for believing that he has standing to bring or participate in such a suit. If UP's own suit would have been an unprotected anticompetitive act because the railroad knew it lacked standing, the Fifth Circuit was justifiably reluctant to allow UP to delay competition by persuading others to initiate the *Andrews* litigation and then stage-managing the conduct of that suit. UP subsequently claimed in the district court, however, that it would have had standing to participate directly in the *Andrews* litigation. ETSI conceded that claim, thereby mooting the Fifth Circuit's ruling. Without a full record disclosing the facts, this Court lacks a realistic context in which to consider the proper contours of *Noerr* immunity for those who involve themselves in the litigation of others solely for the purpose of delaying and thereby preventing competition.

The fourth question which the petitioners put to the Court is simply not presented by the case and reflects a misreading of the Fifth Circuit's opinion—a misreading that pervades the entire petition. The petition pre-

tends that the court of appeals abrogated First Amendment rights "without consideration of the reasonableness of the litigant's legal position and conduct in the proceedings challenged as sham." The Fifth Circuit did no such thing. Not only did that court protect all reasonable conduct, it expressly held that reasonableness would ordinarily be judged by objective standards—standards that *all* of the challenged conduct of the defendants failed. What the Fifth Circuit correctly refused to do was to adopt a narrow test of "success" that would, in the circumstances of this case, immunize conduct that was fully and clearly reprehensible.

II. The Court of Appeals' Refusal to Enunciate Categorical Rules Concerning "Successful" Claims and the Defense of Litigation is Correct and Consistent with the Decisions of this Court and the Lower Federal Courts.

A. Invocation of Government Process to Delay and Impair Competition Rather than Genuinely to Obtain Governmental Relief Is a "Sham" Fully Subject to Antitrust Scrutiny.

In *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961), this Court held that a private conspiracy, however anticompetitively motivated, does not violate the antitrust laws by petitioning a government body to restrain competition. That ruling is clearest where, as in *Noerr*, the adverse impact on competition results from the government's sovereign decision. Of course, competition may be adversely affected not by a legislative or judicial decision itself but by the process of seeking it. In *Noerr*, for example, the plaintiff truckers (and competition) were injured not only by a state's anti-truck legislation for which the defendant railroads had lobbied but also directly by the railroads' publicity campaign, which prejudiced buyers of transportation services against trucking. Nevertheless,

this Court immunized the publicity campaign because it was part of a genuine effort by the railroads to obtain legislation. At the same time, the Court made clear that the joint publicity campaign would be fully subject to the antitrust laws if, though "ostensibly directed toward influencing governmental action, [it] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id.* at 144.

Similarly judged is participation before administrative agencies and courts. A limitation of competition by the agency or court is not attributed to the party seeking that relief. Even if the agency or court rejects that litigant's claim, the accompanying cost, delay, and other burdens on rivals and competition are not antitrust concerns if, but only if, they result from a reasonable effort to obtain relief from the government. This Court so ruled in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). There, trucking firms allegedly agreed to oppose, without regard to the merits, each new entrant's application for a license to engage in the trucking business—opposition which delayed entry or made it more costly. Rejecting the truckers' claim of *Noerr-Pennington* immunity, the Court unanimously held that such a pattern of opposition was a "sham" because it was "instituted . . . regardless of the merits of the cases" and was not a genuine effort to obtain favorable government action. *Id.* at 512; *accord Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (unjustified lawsuit brought with a "purpose . . . to suppress competition" is sham), *aff'd after remand*, 417 U.S. 901 (1974).

Of course, the "sham" is not easy to identify; by its very nature, it is a subterfuge that attempts to cast a gauzy cloak of legitimate petitioning over conduct that burdens competition notwithstanding the litigant's indifference to the judicial relief apparently sought by the petitioning. Following this Court's guidance, the court

of appeals here, Pet., App. A at 15a-20a, and other courts have repeatedly recognized that litigation is a sham when a litigant is not "genuinely . . . attempting to influence governmental decisionmaking," *id.* at 16a, *citing Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983). A sham occurs if claims are asserted "not to influence the government and obtain relief, but rather to harm a competitor through the mere invocation and maintenance of the process . . . ." Pet., App. A at 16a.[18]

Petitioners cannot quarrel with these concepts. Rather, they seek to eviscerate the concepts by insisting upon rigid, categorical rules of application:

1. Petitioners insist upon categorical immunity for all their activities in *Andrews* because one of their twenty-one scattershot claims turned out to be successful in the hands of other parties. They would thus have the Court ignore both the fraudulence of their conduct in the underlying administrative proceeding and the baselessness of their twenty unsuccessful claims in court which, though never ruled upon, were made intentionally to delay the outcome of the project, raise its costs, create uncertainty about its prospects among potential customers who turned elsewhere, and kill competition.

2. Although petitioners thus demand a very narrow "success" test to immunize even the most egregious conduct in *Andrews*, they would then have the Court ignore the objective baselessness of

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[18] *See also* Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982) (purpose to harass and deter by the process itself), *cert. denied*, 461 U.S. 958 (1983); Litton Systems, Inc. v. AT&T Co., 700 F.2d 785, 810 (2d Cir. 1983) (the "heart of the sham exception [is] invoking the process . . . for the injury that the process alone will work upon competitors"), *cert. denied*, 464 U.S. 1073 (1984); Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678, 687 (4th Cir. 1982) (sham where appeal intended to delay approval of necessary certificate and delay competitor's entry into market), *cert. denied*, 464 U.S. 890, 904 (1983).

> sixty-nine successive defeats in the window litigation. No matter, they say, how unjustifiable the five and one-half years of delay they thereby imposed upon ETSI, any misconduct is automatically immune from the antitrust laws because they were defendants in those suits.

As we show in the sections below, neither rule is worthy of this Court's consideration.

B. Litigation, "Successful" in Some Sense, Can Be Sham, Particularly Where It Occurs As Part of a Pattern of Repetitive and Insubstantial Claims.

The petitioners err in asserting that any "success" always negates the existence of a sham, that the Fifth Circuit would allow reasonable conduct to be considered a sham, and that the circuits are in conflict over "subjective" versus "objective" tests of sham.

1. The fundamental error made throughout the petition is its premise that "success" is a simple and uniform characteristic, which provides a bright-line test governing all situations and providing talismanic protection, no matter how limited or peculiar the success. There are many kinds of success. The patent or copyright holder who succeeds in proving an infringement probably had reasonable cause to initiate those suits. *See* P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 203.1(c)-(d) (Supp. 1987). But the success enjoyed by the petitioners here was limited indeed. *Andrews* was but one proceeding in a ten-year campaign involving more than a hundred unsuccessful proceedings against ETSI; the successful claim (on which the sole railroad plaintiff was found not to have standing) was accompanied by twenty other baseless and delaying claims; and the lawsuit was preceded by an administrative proceeding in which the railroads purposefully hid the ball to avoid attaining administrative relief that would have mooted their lawsuit and prevented them from achieving the delay they sought. *See* pp. 9-12, *supra*.

Indeed, the parallel to this Court's *California Motor* decision is striking. There one group of truckers alleged that a competing group of truckers conspired to exclude plaintiffs from the market by means of a "consistent, systematic and uninterrupted program" of opposing, "with or without probable cause and regardless of the merits," every application for certification by plaintiffs to operate as a motor carrier. 404 U.S. at 518 (Stewart, J., concurring). The district court declined to find a sham because twenty-one out of forty proceedings had "resulted in action favorable to the defendants." *Trucking Unlimited v. California Motor Transport Co.*, 1967 Trade Cas. (CCH) ¶ 72,298, at 84,744 (N.D. Cal. 1967). The Ninth Circuit reversed, because the defendants' conspiracy systematically to oppose every application regardless of the merits was intended to injure competition "directly," independently of the "incidental" and "indirect" impact on competition of an occasional success. *Trucking Unlimited v. United Motor Transport Co.*, 432 F.2d 755, 763 (9th Cir. 1970).

This Court affirmed, holding that a "massive, concerted, and purposeful" program of opposing rival applications "with or without probable cause" would be a sham. 404 U.S. at 512, 515. That some of the defendant's challenges had been successful ("with . . . cause") did not absolve "a pattern of baseless, repetitive claims" that "leads the fact finder to conclude that the administrative and judicial processes have been abused." *Id.* at 513.[19]

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[19] *See also* Otter Tail Power Co. v. United States, 410 U.S. at 380 (the sham exception applies "where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims"); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 543 n.6 (5th Cir. 1978) ("showing a pattern of repetitive, baseless claims is strong evidence of sham petitioning"), *cert. denied*, 444 U.S. 924 (1979); Coastal States Mktg., Inc. v. Hunt, 694 F.2d at 1369 n.37 ("[t]he number of lawsuits filed without success is itself circumstantial evidence of sham"); *accord* Areeda, *supra*, ¶ 203.1(e) at 23.

The Court thus made clear that an occasional success, in a scattershot of claims and proceedings brought without regard to the probability of success, does not categorically establish legitimacy and immunize the conduct.

The Fifth Circuit was therefore entirely correct in refusing to exonerate all conduct related to the *Andrews* litigation on the basis of the petitioners' limited and peculiar success.

2. Petitioners misrepresent the Fifth Circuit's opinion as allowing *Noerr* and First Amendment rights to be "abrogated without consideration of the reasonableness of the litigant's legal position and conduct in the proceedings challenged as sham." Pet. at i; *see also id.* at 20. In fact, that court made the reasonableness of the petitioners' administrative and legal challenges determinative. Repeatedly, it defined a sham as action with "no reasonable expectation of judicial relief" or "no reasonable basis for party standing," noting that "a complete lack of reasonableness necessarily must deprive a person of protection." *E.g.*, Pet., App. A at 19a, 29a-30a.

Moreover, the court accorded great weight to objective success in determining reasonableness. Thus the court held that success, demonstrating objective reasonableness, is "forceful evidence that the petitioner did in fact wish to influence the governmental decision and obtain the relief prayed for." *Id.* at 15a. What the court refused to do was to "lay down a categorical rule that successful petitioning can never be sham," *id.*, because "we cannot say that important cases will not exist in which the evidence establishes that, despite having a meritorious claim, a party was motivated not by a desire to obtain relief but to harass and interfere with the activities of a competitor through the process itself," *id.* at 18a.

3. Petitioners' assertion of a conflict among the lower courts on the application of a "subjective" versus an "objective" test is enormously overdrawn. Most courts

do not distinguish such standards or even discuss them. Although they generally agree that the sham determination is a factual one,[20] and also agree that the party who wins a suit may well have had probable cause to bring it,[21] most cases in all the circuits have defined the "sham" concept in terms similar to those used below[22] or have

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[20] *See, e.g.*, Areeda, *supra*, ¶ 203.1(a) at 16 & n.17 (and cases cited therein).

[21] *See, e.g.*, Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1079 (9th Cir. 1976) ("particularly hard" to accept characterization as baseless or frivolous where defendant succeeded in three proceedings involving zoning variances), *cert. denied*, 430 U.S. 940 (1977); Mid-Texas Communications Systems, Inc. v. AT&T Co., 615 F.2d 1372, 1383 (5th Cir.) (dictum: success in challenged litigation would make inference of sham "difficult"), *cert. denied*, 449 U.S. 912 (1980); First American Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439, 1448 (8th Cir. 1983) (court found a "genuine interest" in judicial relief), *cert. denied*, 464 U.S. 1042 (1984); Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 265 (D.C. Cir. 1981) (success is evidence of defendant's genuineness), *cert. denied*, 455 U.S. 928 (1982); Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1257 (9th Cir. 1982) (success treated as "probative evidence" that litigation not sham; dictum questions whether meritorious suits can be sham).

[22] Petitioners assert that six circuits have adopted an "objective" test for sham—namely the Third, Sixth, Eighth, Tenth, Eleventh and District of Columbia Circuits. In fact, each of those courts has focused on whether the allegedly sham claims were genuine attempts to influence governmental decision making, or mere attempts to harm competitors directly by the act of petitioning. *See, e.g.*, Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 725 (8th Cir. 1986) ("the essence of the 'sham' exception" involves a determination whether "defendant's petitioning activities [were] genuine attempts to influence government action, or . . . designed to directly interfere with the business relationships of a competitor"), *cert. denied*, 107 S.Ct. 1358 (1987); Westmac, Inc. v. Smith, 797 F.2d 313, 317 (6th Cir. 1986) ("intent is relevant when a party allegedly filed a suit without concern for obtaining a favorable judgment, but only directly to harm a competitor"), *cert. denied*, 107 S.Ct. 885 (1987); St. Joseph's Hospital,

more explicitly reserved the possibility that a successful suit could be a sham in appropriate circumstances.[23] None of the circuits has even remotely suggested that a random success in a scattershot of rejected or baseless challenges immunizes unreasonable conduct from the antitrust laws. Certainly, no court has hinted that *Noerr* protects conspirators who expressed the intention to hide their objections from an administrative agency in order *to lose*, while saving those objections for later judicial

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Inc. v. Hospital Corp. of America, 795 F.2d 948, 955 (11th Cir. 1986) (defendant's activities not sham where plaintiff failed to allege that defendant's purpose, although anticompetitive, was "anything more than [to] use the adjudicatory process to obtain a favorable outcome"); Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984) ("good faith attempt to enforce a copyright does not violate antitrust laws"; sham exception applies when "resort to the courts is in bad faith"); Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1175 (10th Cir. 1982) (sham exception applies if "defendant is not seeking official action by a governmental body, so that the activities complained of are 'nothing more' than an attempt to interfere with the business relationships of a competitor"); Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n, 663 F.2d at 268 (defendant's activities not sham where they were "genuine and legitimate attempts to secure governmental action").

[23] *See, e.g.*, Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d at 471-72 (assertion of "colorable" claims unlawful where purpose of litigation is "not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating"); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1254 (9th Cir. 1982) (ultimate "success or failure of the [antitrust defendants' claims] is not singularly determinative of a party's intent"), *cert. denied*, 459 U.S. 1227 (1983); Greenwood Utilities Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1500 (5th Cir. 1985) (recognizing such extraordinary circumstances as conspiracy with the deciding government official would render successful litigation a sham); Frontier Enterprises, Inc. v. Amador Stage Lines, Inc., 624 F. Supp. 137, 145 (E.D. Cal. 1985) (partially successful litigation can still be sham if "purpose" not to win a favorable judgment but "simply to harass" competitor by process of litigating).

review in order to string out the process and impair competition.

C. Defense of Litigation Can Be Sham, Especially Where, As Here, the Defendants Forced Plaintiff to Sue by Anticompetitive, Conspiratorial Conduct and Then Lost Sixty-Nine Straight Cases.

Attempting to justify the categorical rule they propose, petitioners paint themselves as innocent parties who are slapped with window lawsuits and then opened to antitrust condemnation for defending themselves. Covington & Burling, the railroads' lead law firm in this Court, was not misled on that score in 1981 when it opined that "ETSI's long series of victories" in the window cases would support a characterization that "the railroads' unsuccessful defenses of their lawsuits were . . . baseless" and therefore sham. ETSI Crime-Fraud Mem., Att. 61. The reasons for Covington's 1981 conclusion are apparent from the facts: (1) ETSI was "*forced to litigate*"; (2) the railroad defenses were "untenable"; (3) the railroads were "entirely unsuccessful" in sixty-nine straight cases; (4) they pursued discovery for use "in other arenas"; and (5) with an acknowledged purpose to "delay every way we can," the railroads' window opposition delayed the ETSI project for five and one-half years, thus enormously increasing its cost and the uncertainty of its potential customers and substantially contributing to its demise. *See* pp. 6-8, *supra.*

As the Fifth Circuit noted, there is no conflict between its holding and the Seventh Circuit's holding in *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 272 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985), that one "cannot start a suit . . . and then sue the defendant for refusing to default." *See* Pet., App. A at 27a. The facts summarized above amply distinguish the railroads' defense of the window litigation from the facts in *Brunswick* and fully justify the Court's refusal to adopt a *per se* rule that defense of litigation can never be sham.

III. The Fifth Circuit's Holding on Fomenting/Assisting Litigation Is Moot and, in Any Event, Should Not Be Reviewed on the Present Incomplete and Inconclusive Record.

1. The Fifth Circuit opined that it would be "an unwarranted extension" of *Noerr* to hold that a party "without an interest in a case sufficient to allow it to directly petition the court may nonetheless indirectly seek its anti-competitive goals through encouraging and assisting the lawsuits of others." Pet., App. A at 24a. Its opinion on Union Pacific's fomenting/assisting in *Andrews*, Pet., App. A at 23a-26a thus addressed only the situation of a railroad that "had no reasonable claims of standing to participate in *Andrews*," *id.* at 24a n.11.[24]

On remand, UP asserted—and respondents have conceded—that UP *would have had standing* to bring, in its own name, the causes of action asserted by the state of Nebraska in the *Andrews* case. *See* Pet. at 16 n.15. Thus, the Fifth Circuit's holdings on the fomenting/assisting issue are entirely moot and of no consequence to this case.

To be sure, the district court's October 2, 1987 order did find that UP's participation in the *Andrews* lawsuit was sham. Pet., App. F at 92a-93a. However, the basis for that holding was not that UP lacked standing, for the court explicitly declined to make any finding on that issue. *Id.* at 92a. Rather, the district judge found that UP lacked "a genuine desire for judicial relief as a significant motivating factor," and intended "to harm a competitor through the mere invocation and maintenance of the judicial process." *Id.* at 90a-91a. In other words, the district court's sham holding with respect to UP did

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[24] If UP had a reasonable claim of standing in *Andrews*, "the mere fact that Union Pacific did not actually formally join the litigation does *not* deprive it of protection." Pet., App. A at 24a n.11 (emphasis added).

not rest on anything the Fifth Circuit said about fomenting/assisting.[25]

2. It is beyond reasonable dispute that even a party having standing may be liable for treble damages if he initiates litigation without a genuine desire for judicial relief as a significant motivating factor. As this Court has recognized, imposing liability in order to discourage sham litigation by one lacking a legitimate interest in judicial relief would be pointless if such a party could freely foment, fund, and control litigation by another to the same anticompetitive end. *See Otter Tail Power Co. v. United States*, 410 U.S. at 372, 379-80 (litigation "instituted or sponsored" by an antirust defendant can be sham).[26] ETSI has contended that UP instigated or enabled Nebraska to bring the *Andrews* suit and then funded and controlled that litigation without any genuine desire for judicial relief as a significant motivating fac-

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[25] In any event, ETSI is entitled to UP's *Andrews* documents whether or not UP was itself guilty of sham, for it clearly conspired with another sham participant in that suit. The district court has held that ETSI has made a *prima facie* showing that there was a conspiracy among the defendant railroads to conduct a sham litigation campaign against ETSI. Pet., App. B at 48a-51a ("[t]he *prima facie* evidence also shows that the defendant railroads engaged in a coordinated effort which was calculated to delay and frustrate ETSI's efforts by any means, including petitioning the courts"; "the conduct of the defendants in their defense of the window suits, the *Andrews* litigation, and the permitting process were a part of and in furtherance of this conspiracy"); *see also* Pet., App. F at 88a-91a. Having demonstrated the existence of a conspiracy which included KCS's sham petitioning in *Andrews*, and the participation of UP in that conspiracy, ETSI is entitled to the documents generated by, or exchanged with, UP's attorneys in the furtherance of that conspiracy, whether or not UP's assistance to the state of Nebraska was itself sham.

[26] The railroads' reliance on cases immunizing reports of law violations to the police, *see* Pet. at 16-18, is wholly misplaced. The complaining party in those cases (*e.g.*, IBM) had an entirely legitimate personal interest in the enforcement of law (against theft) designed to protect its own legal interests.

tor. The district court's October 2, 1987 findings seem to adopt that view. Pet., App. F at 90a-91a ("Union Pacific, although not named as a formal party to the suit, initiated and facilitated *Missouri v. Andrews* . . . without a genuine desire for judicial relief").

UP pretends that fomenting is merely another phase of its petitioning—here petitioning Nebraska to maintain the *Andrews* suit. But fomenting another's suit, even one by a state, has little connection with *Noerr*'s concern to immunize governmental restraints of competition and private activity seeking such restraints. Moreover, UP inconsistently claims protection for petitioning Nebraska while portraying itself as merely responding to Nebraska's petitioning of UP for assistance. Pet. at 6.

The circumstances of an antitrust defendant's involvement in another's suit, as they may affect application of the principles of *Noerr* and *California Motor*, can vary enormously. At one end of the spectrum, one may altruistically provide only legal or factual research, pursuant to request. At the other end of the spectrum one may foment litigation by instigating a party to bring a suit that would not otherwise have been brought and then surreptitiously funding and controlling the litigation.

We respectfully suggest that it would be unwise for this Court to rule abstractly on those issues at the preliminary stage of this case, where the facts about UP's involvement in others' litigation have not yet been developed or ruled upon by the court of appeals. The legal contours of the *Noerr* protection for fomenting/assisting the litigation of others should be deliberated on the basis of a full record and settled facts, after appellate review, rather than on *certiorari* in the present mandamus proceedings.[27]

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[27] Subsequent to the filing of the petition for *certiorari*, ETSI and the Union Pacific entered into a settlement agreement pursuant to which the district court dismissed ETSI's claim against UP on November 5, 1987. As a result, ETSI no longer asserts any treble

CONCLUSION

The railroads' petition rests on the false legal premise that what is generally appropriate is *always* appropriate without regard to the circumstances. It deals in abstractions without regard to context. The very necessity of confronting the circumstances makes grant of the writ inappropriate at this mandamus stage of the suit.

Respectfully submitted,

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November 30, 1987

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damage claim against UP. Since UP is the only railroad accused of "assisting" a state government, the issue whether such assistance "can give rise to treble damage liability under the antitrust laws" is no longer presented by ETSI's complaint.